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NO. 83-39

In the Supreme Court of the United States

OCTOBER TERM, 1983

T.N.T. MARINE SERVICE, INC.,
Petitioner

versus

WEAVER SHIPYARDS AND DRYDOCKS, INC.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTION PRESENTED FOR REVIEW

Whether the Appellate Court erred in denying the plaintiff's right to a jury trial when jurisdiction was based upon diversity of citizenship and all maritime claims were tried as suits at law.

II.

LIST OF INTERESTED PARTIES

Counsel for T.N.T. Marine Service, Inc. certifies and represents, in order that the Justices of the Court may evaluate possible disqualification or recusal, that the parties in the United States Court of Appeals for the Fifth Circuit are:

(1) T.N.T. Marine Service, Inc.

(2) Weaver Shipyards and Drydocks, Inc.

III.

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OPINIONS BELOW

The Opinion of the Court of Appeals affirming the District Court's judgment against Petitioner is set forth in Appendix A to this Petition and is reported at 702 F.2d 585 (5th Cir. 1983). A Petition for Rehearing was not filed. The Judgment of the District Court appears in Appendix B.

JURISDICTION

The Fifth Circuit's Opinion of

April 11, 1983, affirming the District Court's judgment against the Petitioner, appears in Appendix C. Petitioner did not request a rehearing. The instant Petition for Certiorari is being filed within the prescribed period of ninety (90) days after April 11, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

1. 28 U.S.C. §1332 (1956) - Diversity of citizenship; amount in controversy; costs.

(a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interests and costs and is between -

(1) citizens of different States;

2. 28 U.S.C. §1333 (1949). Admiralty, maritime and prize cases.

The District Courts shall have original jurisdiction, exclusive of the Courts of the States, of;

(1) Any civil case of admiralty or maritime jurisdiction saving to suitors in all cases all other remedies to which they are otherwise entitled.

3. U.S. Const. amend. VII - In Suits at common law, where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined, in any Court of the United States than according to the rules of the common law.

4. Fed.R.Civ.P. 9(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the District Court on some other ground may contain a statement identi-

fying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty it is admiralty or maritime claim for those purposes whether so identified or not. (As amended Feb. 28, 1966, eff. July 1, 1966.)

5. Fed.R.Civ.P.38 Jury Trial of Right

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h). (As amended Feb. 28, 1966, eff. July 1, 1966).

STATEMENT OF THE CASE

T.N.T. Marine Service, Inc. (hereinafter "Petitioner" or "T.N.T.") commenced an action against Weaver Shipyards and Drydock,

Inc. (hereinafter "Respondent" or "Weaver") in personam and the TUG OCEAN WIND, a vessel owned by Weaver, in rem. T.N.T. sought remedies in contract, both civil and maritime, and in tort. T.N.T. alleged federal subject matter jurisdiction based on diversity of citizenship.

T.N.T's complaint alleged that T.N.T. and Weaver entered into oral contract for drydocking and repairs on T.N.T.'s vessel. T.N.T.'s vessel was to be stored at Weaver's yard, awaiting the availability of space on Weaver's drydock. While moored at Weaver's facility, the vessel sank, due to the negligence of Weaver's employees. The complaint also alleged that equipment appurtenant to T.N.T.'s vessel had been removed and converted.

T.N.T. explicitly requested trial by jury in its complaint (see Appendix E), as it brought this action under the Court's diversity jurisdiction. T.N.T. also asserted admiralty

jurisdiction with respect to its in rem claims against the TUG OCEAN WIND. T.N.T. withheld service, attachment, and in rem seizure of the OCEAN WIND (see Appendix 7), and thus never pursued any claims within the court's admiralty jurisdiction. T.N.T. never availed itself of the procedural benefits accruing in admiralty.

The case was properly before the United States District Court for the Eastern District of Texas in its diversity jurisdiction, pursuant to 28 U.S.C. §1332. Petitioner, T.N.T., was and is a Florida corporation engaged in the business of towing and salvage. Weaver Shipyards was and is a corporation organized and existing pursuant to the laws of the State of Texas with its principal place of business in Orange, Texas. Thus, there is complete diversity of citizenship between the Petitioner, T.N.T., and the Respondent, Weaver Shipyards. The size of the claim exceeded ten thousand

dollars.

Weaver answered T.N.T.'s complaint, denying T.N.T.'s claims in negligence and tortious conversion. Weaver asserted a contractual counter-claim for services rendered in salvaging T.N.T.'s sunken vessel.

As the litigation developed, Weaver filed a motion to strike T.N.T.'s Jury Request, claiming that T.N.T. had elected to proceed in admiralty by bringing an in rem action.

In its opposition memorandum, T.N.T reiterated that the action was in diversity. Even though T.N.T. had dropped its in rem proceeding, T.N.T. showed that under Fifth Circuit case law, a pendent in rem proceeding does not defeat a plaintiff's right to a jury trial.

The trial judge, Parker, granted Weaver's motion. Parker then heard the case, finding for Weaver, on T.N.T.'s claim and the counter-claim. The Judge concluded that the

case was an admiralty proceeding, with jurisdiction predicated on 28 U.S.C. §1333, and T.N.T. was not entitled to a jury trial.

T.N.T appealed the decision of the District Court in denying its request for a jury trial and finding that Weaver was not a bailee of T.N.T.'s vessel. On April 11, 1983 the Fifth Circuit Court of Appeals affirmed Judge Parker's decision. (See Appendix A).

T.N.T. now seeks relief from this Court.

REASONS FOR GRANTING THIS WRIT

1. The Fifth Circuit opinion conflicts with applicable Supreme Court precedent.

2. In denying the Petitioner the right to a jury trial, the Fifth Circuit entered a decision in conflict with decisions in the Third and Ninth Circuits.

3. The Fifth Circuit decision conflicted with previous Fifth Circuit juris-

prudence.

4. The basis for the Fifth Circuit's ruling was erroneous as Petitioner had not pursued any of its claims in admiralty, had not availed itself of any admiralty procedures, and had only pursued claims sounding at law, predicated upon diversity jurisdiction.

5. The denial of the Petitioner's right to a jury trial constituted a serious abridgment of Petitioner's Seventh Amendment rights.

6. Since the merger of law and admiralty in 1966, there has been no uniform precedent to guide plaintiffs who seek a jury trial when bringing an action containing claims at law and at admiralty.

ARGUMENT

1. The Fifth Circuit opinion conflicts with applicable Supreme Court precedent.

This Court has held that a breach of a

maritime contract is an ordinary civil action. Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355, 359 (1962). "Such suits on the law side are not restricted to enforcement of common-law rights but extend as well to maritime tort." Id. at 359, Seas Shipping Co. v. Sieracki, 328 U.S. 85, 88, 89 (1946).

A maritime suit in the federal courts by reason of diversity of citizenship carried with it, the right to trial by jury. 369 U.S. 355, at 359. Petitioner brought the instant action in diversity. While the substantive law to be applied may be maritime, the procedure to be used is common law. The action was based upon a maritime contract, negligence, and tortuous coversion. Under the Ellerman ruling, Petitioner was clearly entitled to a jury trial. "This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury." Id. at

360.

T.N.T.'s use of the phrase "this is also a maritime contract claim" did not destroy the jurisdictional basis of diversity nor defeat the right to a jury. Having properly alleged claims cognizable at law and having alleged a sound basis for diversity jurisdiction, the joinder of claims cognizable only in admiralty would not defeat his right to a jury under Fitzgerald v. United States Lines, 374 U.S. 16, (1963).

In Fitzgerald the Supreme Court extended the right to a jury trial when a proceeding is brought on common law and admiralty claims. "Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historic developments." Id. at 21. In Fitzgerald, this Court held that a plaintiff who brought a Jones Act

action "at law" and an action for maintenance and cure was entitled to a jury trial on both claims. "While the Seventh Amendment does not require jury trials in admiralty cases, neither that Amendment nor any other provision of the Constitution forbids them." Id. at 20. Thus, when a plaintiff couples common-law and admiralty claims, the plaintiff has a right to jury trial on all claims.

2. In denying the Petitioner a right to a jury trial, the Fifth Circuit entered a decision in conflict with decisions in the Third and Ninth Circuits.

The Fifth Circuit's decision in the instant case is in direct conflict with a prior decision of the Third Circuit. In Haskins v. Point Towing Co., 395 F.2d 737 (3rd Cir. 1968), the plaintiff brought an action designated as a "'Libel in Admiralty, In Rem, and In Personam'" Id. at 738. The plaintiff was a Jones Act

seaman. The District Court denied the plaintiff a jury trial. The Third Circuit reversed, finding that the plaintiff was entitled to have all his claims heard by a jury, and that no rule of admiralty law precluded jury trial of all claims. In short, the plaintiff did not forfeit the right to a jury trial by adding admiralty claims. The Third Circuit interpreted a demand for a jury trial of the Jones Act claim as a choice that the Jones Act claim be designated as an action at law. Id. at 741. The Third Circuit reaffirmed the principles of Haskins in Semco v. C & C Marine Maintenance Co.., 594 F.2d 960 (3rd Cir. 1979). In the instant case, the Fifth Circuit reached the opposite decision. They interpreted a pleading specifically stating that an action was being brought at law (see Appendix A) as an action in admiralty. The Fifth Circuit's holding that inclusion of an admiralty claim with claims properly pursued at

law effects a forfeiture of the right to jury trial on all claims is in direct conflict with the Third Circuit's view. In the Third Circuit, once a plaintiff makes a claim at law, he is entitled to a jury trial even on pendent admiralty claims. 594 F.2d 960, 966. See also Blake v. Pharaoh Lines, Inc., 417 F.2d 264 (3rd Cir. 1969).

The Fifth Circuit is in conflict with the Ninth Circuit as well. In Peace v. Fidalgo Island Packing Company, 419 F.2d 371 (9th Cir. 1969), the Ninth Circuit held that a claimant was entitled to a jury trial on both a Jones Act claim and a Death on the High Seas Act claim. Thus, when a claimant brings an action at law and an action tried as an action in admiralty, in the Ninth Circuit, the claimant is entitled to a jury trial on both claims. This is in direct conflict with the decision reached by the Fifth Circuit in this case.

3. Conflict with Fifth Circuit precedent.

In Powell v. Offshore Navigation, Inc., 644 F.2d 1063 (5th Cir. 1981), the Fifth Circuit reiterated the rule: "a common law claim heard under the Court's diversity jurisdiction is nevertheless beyond the reach of the admiralty rule restricting the right to trial by jury." The Fifth Circuit thus mandated jury trial when an action is brought in diversity:

> Since a federal court exercising its diversity jurisdiction to hear an in personam maritime claim is sitting as a common-law court, the parties in a diversity action may assert their right to trial by Jury despite the limitations associated with actions in admiralty. Powell's in personam claim, which are based on the defendant's alleged negligence and on the vessel's alleged lack of seaworthiness, may of course be brought in State common-law courts as well as in federal admiralty courts. Therefore Powell was entitled to a jury trial if he could invoke the diversity jurisdiction of the district court to hear his maritime claims at law.

Id. at 1066.

T.N.T. invoked diversity jurisdiction. T.N.T. sought none of the special admiralty procedures and never even attempted seizure of the TUG OCEAN WIND (see Appendix F). T.N.T. was nonetheless denied a jury trial.

Current Fifth Circuit jurisprudence is a trap for the unwary. In the case at hand, the Petitioner followed the procedure to obtain a jury trial outlined in Romero v. Bethlehem Steel Corp., 515 F.2d 1249 (5th Cir. 1975). In Romero, the plaintiff stated alternate bases of jurisdiction, diversity jurisdiction and admiralty. The Fifth Circuit held that there was no right to a jury trial because plaintiff labelled his admiralty claim with a Rule 9(h) designation. The court denied Romero a jury trial, holding, "Romero could have obtained a jury trial on all claims simply by omitting or withdrawing the 9(h) designation in his com-

plaint and bringing his entire suit as a civil action." Id. at 1254.

In the instant case, the Petitioner followed Romero instructions in order to obtain a jury trial. There is no 9(h) designation in the complaint. (See Appendix E). The Fifth Circuit's action in denying the Petitioner a jury trial was an unfair deviation from precedent as plaintiff had followed the Romero instructions to the letter. A plaintiff who follows the instructions of Romero in seeking a jury trial may be denied one under T.N.T.

4. The basis for the Fifth Circuit's ruling is erroneous as Petitioner had not pursued any of its claims in admiralty.

The Fifth Circuit's decision in this case is even more mystifying when we consider that the Petitioner had elected to forego all admiralty remedies at the time the motion to strike the jury was brought and the case was

brought to trial. The Petitioner never attempted seizure of the vessel OCEAN WIND. The Petitioner never availed itself of the advantages of an admiralty proceeding. Nonetheless, the Fifth Circuit has found that the Petitioner forfeited its common-law right to a jury trial. The Fifth Circuit ignored the fact that no in rem claim was pursued. 702 F.2d 585, at 588. (Appendix A). Without the admiralty proceeding, the instant case becomes an action for tortious conversion, maritime contract, and maritime tort brought at common-law. Thus, under the rule of Ellerman, the Petitioner was entitled to jury trial on all of its claims.

5. The Petitioner has suffered a serious abridgment of his Seventh Amendment rights.

The Seventh Amendment provides the right to a jury trial for all suits at common-law when the amount in controversy exceeds

twenty dollars. There is no question that the amount in controversy in the case at hand exceeded twenty dollars. The recovery on the counter-claim exceeds twenty thousand dollars. The suit was in the federal courts by reason of diversity of citizenship and thus not an admiralty action. Petitioner therefore had the right to a jury trial as part of its remedy against the Respondent. Ellerman 369 U.S. 355, 360.

In Fitzgerald, 374 U.S. 16, the Supreme Court found the jury to be the fact finder of choice in cases where a proceeding at law was joined with a proceeding in admiralty. "Therefore the jury, a time-honored institution in our jurisprudence, is the only tribunal competent under the present congressional enactments to try all the claims." Id. at 21. The Petitioner brought an action at law, in diversity and was entitled to a jury. The

decision of the Fifth Circuit, affirming this violation of the Petitioner's fundamental right, must be reversed.

6. Need for Supreme Court interpretation.

There is a clear conflict among the decisions of the Third Circuit, the Fifth Circuit, the Ninth Circuit, and the Supreme Court on the issue of whether the plaintiff who brings an action at law with an action in admiralty is entitled to a jury trial on both of its claims, one of its claims, or neither of its claims. This confusion is engendered by the rules themselves. In the Advisory Committee's Note accompanying Rule 9 of the Federal Rules of Civil Procedure, the Committee recognized the inherent ambiguity in Rule 9.

> After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader's

> intentions regarding the procedure invoked. The allegation of diversity of citizensthip might be regarded as a clue indicating an intention to proceed as at present under the saving to suitors clause; but this too would be ambiguous if there is also reference to the admiralty jurisdiction, and the pleader ought not be required to forego mention of all available jurisdictional grounds.

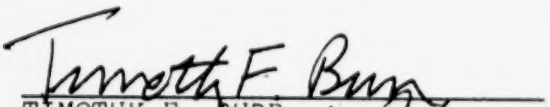
39 F.R.D. 75, 76 (1966). A clear Supreme Court precedent could prevent needless confusion. As this Court has not considered this issue since the merger of law and admiralty in 1966, the issue is ripe for adjudication at the highest level. At the present time, under Fitzgerald, it is clear that when a Jones Act seaman brings an action for maintenance and cure both his negligence action and the maintenance and cure action will be tried to a jury. 374 U.S. 16, at 20. There is no sound reason why a plaintiff who brings contract, negligence, and conversion actions at law, and a pendent admiralty action

should be denied a right to a jury. (This is especially so where Petitioner withheld admiralty process and *in rem* seizure and enjoyed none of the procedural advantages of admiralty, e.g., maritime attachment and garnishment, *see* 702 F.2d 585, *reprinted in* Appendix A.) Only this Court can resolve the ambiguity in Rule 9(h) and the conflict among the Circuits.

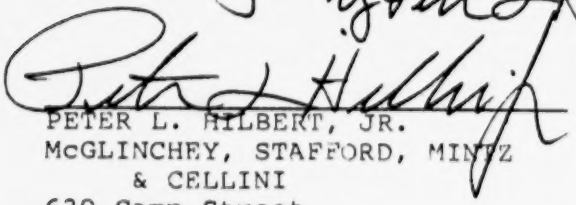
CONCLUSION

Petitioner respectfully submits that this Court should issue a Writ of Certiorari to the Fifth Circuit Court of Appeals to resolve the present conflict among the Circuits and with Supreme Court precedent. The ambiguity inherent in Rule 9(h), and the interpretation of Rule 9(h) by the Fifth Circuit in a manner which seriously abridges Seventh Amendment rights, demand Supreme Court consideration.

Respectfully submitted,



TIMOTHY F. BURR



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CERTIFICATE OF SERVICE

I hereby certify that I have deposited three copies of the above and foregoing Petition for Writ of Certiorari in the United States mail, first class postage prepaid, and addressed to:

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Beckenstein, McNicholas, Oxford,
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on this 8th day of July, 1983.

PETER L. HILBERT, JR.

APPENDIX "A"

T.N.T. MARINE SERVICE, INC.
Plaintiff-Appellant,

v.

WEAVER SHIPYARDS & DRY DOCKS, INC., in personam, and against the TUG OCEAN WIND, her engines, tackle, etc., in rem.,
Defendant-Appellee.

No. 82-2221
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 11, 1983.

Owner of vessel which sank while awaiting repairs and dry docking at shipyard brought action against shipyard. The United States District Court for the Eastern District of Texas, Robert M. Parker, J., entered judgment in favor of shipyard, from which owner appealed. The Court of Appeals held that: (1) where complaint contained statement identifying claim as an admiralty or maritime claim, there was no right to a jury trial, even though diversity jurisdiction, which was also alleged in complaint, existed as well, and (2) where no written contract of bailment existed between owner of ship and shipyard during time of ship's sinking, and where owner's president and an employee had access to ship while it was moored at shipyard, no bailment relationship existed.

Affirmed.

Clann & Pearson, Michael K. Clann, Houston, Tex., for plaintiff-appellant.

Benckenstein, McNicholas, Oxford, Radford, Johnson & Nathan, Hubert Oxford, III, Beaumont, Tex., Fulbright & Jaworski, R. Scott Hogarty, Houston, Tex., for Weaver Shipyards & Dry Docks, Inc.

Appeal from the United States District Court for the Eastern District of Texas.

Before REAVLEY, GARWOOD and JOLLY, Circuit Judges.

PER CURIAM:

The M/V CAPE SAN JUAN, owned by plaintiff-appellant T.N.T. Marine Service, Inc., sank on or about April 28, 1977 while awaiting repairs and dry docking at the facilities of defendant-appellee Weaver Shipyard and Drydock, Inc. The sinking was the result of electrolysis which caused two small holes in the vessel's bottom.

Trial was held before the district judge, who found that there was insufficient evidence to establish that the defendant was a bailee of the vessel, was negligent, or was a cause in fact or a proximate cause of the electrolysis. On appeal, the plaintiff argues that the district court erred in denying its request for a jury trial, and that the finding that no bailment existed was clearly erroneous. We affirm.

I.

Appellant asserts a right to a jury because diversity jurisdiction under 28 U.S.C. § 1332, as well as admiralty

jurisdiction under 28 U.S.C. § 1333, exists in this case. While never denying that diversity exists, appellee maintains that the suit was properly characterized as one in admiralty for purposes of deciding the right to a trial by jury.

Numerous and important consequences flow from whether a district court treats a case as falling under admiralty or diversity jurisdiction. The Federal Rules of Civil Procedure give special treatment to admiralty claims, as do the Supplemental Rules for Certain Admiralty and Maritime Claims. *See* Fed.R.Civ.P. 9(h), 14(c), 38(e), 82; 5 Wright & Miller, Federal Practice and Procedure: Civil § 1313 at 453 (1969). Special rules as to venue and interlocutory appeal apply to admiralty suits. Fed.R.Civ.P. 9 advisory committee note (1966 amendment). The availability of certain maritime remedies, such as maritime attachment and garnishment, actions in rem, possessory, petitory and partition actions and limitation of liability, depends on the source of jurisdiction as well. *Id.* Of particular note in this case is that an action against the vessel in rem would fall within the exclusive admiralty jurisdiction and could not be brought under diversity jurisdiction. *Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063, 1065 n. 3 (5th Cir.), *cert. denied*, 454 U.S. 972, 102 S.Ct. 521, 70 L.Ed.2d 391 (1981). Other aspects of substantive law would vary as well, since state law applies to diversity suits under the *Erie* doctrine, while federal common law governs admiralty suits. To give one important example, admiralty suits routinely allow recovery of prejudgment interest, a rule that may or may not apply under applicable state law. *Dow Chemical Co. v. M/V GULF SEAS*, 593 F.2d 613, 614 (5th Cir.1979). Finally, the Seventh Amendment right to trial by jury in suits at "common law" applies to diversity suits but not to admiralty suits. Fed.R.Civ.P. 38(a), (e).

A plaintiff who has a state common law cause of action that also falls within the federal admiralty jurisdiction may elect to bring the suit either as a state common law action in state court or in federal court (assuming he meets the diversity jurisdiction requirements for federal court). 28 U.S.C. § 1333(1); *Powell, supra*, at 1066. In this case, the complaint asserted both admiralty and diversity jurisdiction. The issue on appeal is how to characterize the suit for purposes of deciding whether the plaintiff has a right to trial by jury.

Fed.R.Civ.P. 9(h) directly addresses this question and states, in pertinent part:

> A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not.

The Rule makes two points relevant here. The first sentence indicates that a suit falling under admiralty as well as diversity jurisdiction will be treated as an admiralty case for purposes of the right to a jury trial (Rule 38(e)) if the pleading contains an "identifying statement" asserting an admiralty or maritime claim. The plaintiff may elect to have a suit treated as either a diversity or admiralty suit, each option having advantages and disadvantages, but the plaintiff's case will be treated as one in admiralty "by a simple statement in his pleading to the effect that the claim

is an admiralty or maritime claim." Fed.R.Civ.P. 9 advisory committee note (1966 amendment). Therefore, there is no right to a jury trial where the complaint contains a statement identifying the claim as an admiralty or maritime claim, even though diversity jurisdiction exists as well. *Romero v. Bethlehem Steel Corp.*, 515 F.2d 1249 (5th Cir.1975).

The second sentence of Rule 9(h) makes clear that Rule 38(e) denies a right to trial by jury on any claim that is cognizable only in admiralty, regardless of what the pleading says. "Some claims for relief can only be suits in admiralty, either because the admiralty jurisdiction is exclusive or because no nonmaritime ground of federal jurisdiction exists." Fed.R.Civ.P. 9 advisory committee note (1966 amendment).

Applying these rules, we hold that the plaintiff elected to bring the suit in admiralty. Although the complaint alleged diversity jurisdiction, it went on to state: "This is also a suit for breach of a maritime contract and for maritime tort." While the preferable technique might be to expressly invoke Rule 9(h) (*see* Wright & Miller, *supra*, at 454; Fed.R.Civ.P. Forms 2(d), 15), this quoted language from the complaint is a simple statement asserting admiralty or maritime claims under the first sentence of Rule 9(h), as is the opening line of the complaint: "The Complaint of T.N.T. Marine Service, Inc. ... against Weaver Shipyards & Dry Docks, Inc. ... for breach of contract, civil and maritime, and for maritime tort avers on information and belief as follows ...."

Furthermore, the complaint is styled as one against "WEAVER SHIPYARDS & DRY DOCKS, INC. *in personam* and against the Tug OCEAN WIND, her engines,

tackle, apparel, etc. *in rem.*" As explained above, an action against a vessel in rem falls within the exclusive admiralty jurisdiction. Thus, under the second sentence of Rule 9(h), there would be no right to trial by jury as to any in rem claims brought against the vessel.

In short, the plaintiff elected to bring the suit under admiralty jurisdiction, and cannot now complain about his right to a jury. Rule 9(h) is not a harsh rule, for its third sentence expressly provides that the liberal procedures for amending complaints found in Rule 15 apply to identifying statements. In this instance, the plaintiff chose not to amend its complaint, and it is not entitled to a second trial.

II.

Appellant's second argument is that the district court erred in finding that no bailment relationship existed. this finding was one of fact and will not be overturned unless clearly erroneous. Fed.R.Civ.P. 52(a); *Movible Offshore, Inc. v. M/V WILKEN A. FALGOUT*, 471 F.2d 268, 271 (5th Cir.1973).

A bailment has been defined as:

> A delivery of goods or personal property, by one person to another, in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and *upon a contract*, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.

Black's Law Dictionary 129 (5th ed. 1979) (emphasis

added). *See also* 8 C.J.S. *Bailments* § 1 (1962) (bailment "comprehensively defined as meaning a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, expressed or implied ....") In this case we find no written document in the record that can be said to constitute a contract between the litigants for a bailment during the time of the vessel's sinking. To the extent that appellant is asserting that an oral or implied contract existed, his claims necessarily hinge on the testimony presented at trial, most or all of it interested, and the trial court made credibility determinations that we do not feel compelled to question or overturn.

It has been stated that an admiralty bailment does not arise unless the delivery to the bailee is complete and he has exclusive right to possession of the bailed property, even as against the owner. *Continental Insurance Co. v. Washeon Corp.*, 524 F.Supp. 34, 37 (E.D.Mo.1981). A bailee's duties are limited when the owner or his agent or employee remains with the vessel or has access to it. *Id.; Stegemann v. Miami Beach Boat Slips*, 213 F.2d 561, 565 (5th Cir.1954). In this case the testimony indicated that the president of T.N.T. Marine Service, Inc. and an employee had access to the M/V CAPE SAN JUAN while it was moored at the defendant's facility. The record of the trial as a whole does not lead us to conclude that the trial court's finding on the bailment issue was clearly erroneous.

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

T.N.T. MARINE SERVICE, INC.

V. CIVIL ACTION NO. B-80-122-CA

WEAVER SHIPYARD & DRYDOCK
INC., *in personam*, and the
TUG OCEAN WIND, her engines,
tackle, apparel, etc., *in rem*

JUDGMENT

PURSUANT TO THE Findings of Fact and Conclusions of Law entered this date, Judgment is hereby entered for the Defendant in the amount of TWENTY-TWO THOUSAND TWO HUNDRED EIGHTY-THREE AND 00/100 DOLLARS ($22,283.00) plus interest at the rate of nine percent (9%) per annum from June 30, 1977, until paid.

SIGNED and ENTERED this 22nd day of April, 1982.

ROBERT M. PARKER
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

T.N.T. MARINE SERVICE, INC.

V. CIVIL ACTION NO. B-80-122-CA

WEAVER SHIPYARDS & DRYDOCK, INC., *in personam*, and the Tug OCEAN WIND, her engines, etc., *in rem*

ORDER

Having considered the Defendant's MOTION TO STRIKE JURY REQUEST, the Court is of the opinion that the motion should be GRANTED.

ORDERED this 8th day of September, 1981.

ROBERT M. PARKER
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

T.N.T. MARINE SERVICE, INC.

V. CIVIL ACTION NO. B-80-122-CA

WEAVER SHIPYARD & DRYDOCK, INC., *in personam*, and the TUG OCEAN WIND, her engines, tackle, apparel, etc., *in rem*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Federal Rule of Civil Procedure 52, the Court hereby enters the following Findings of Fact and Conclusions of law:

FINDINGS OF FACT

1. This is a non-jury admiralty suit brought by T.N.T. Marine Service, Inc. against Weaver Shipyard and Drydock, Inc. and the TUG OCEAN WIND. It arises out of the sinking of the M/V CAPE SAN JUAN on or about April 28, 1977, while it was docked at Defendant's Shipyard, and out of the alleged removal of equipment from the M/V CAPE SAN JUAN, also while it was docked at Defendant's shipyard.

2. Defendant counterclaimed seeking recovery of costs incurred in the salvage and repair of the M/V CAPE SAN JUAN.

3. Plaintiff was at all material times the owner of the M/V CAPE SAN JUAN.

4. Defendant was at all material times the owner of a shipyard and ship repair facility on the Neches River in Orange, Texas.

5. The M/V CAPE SAN JUAN sank on or about April 28, 1977 at Defendant's shipyard in Orange, Texas.

6. There is insufficient evidence to establish that a bailment relationship existed between Plaintiff and Defendant such that Defendant would have been a bailee of the M/V CAPE SAN JUAN at the time the vessel was in Defendant's shipyard or at the time the vessel sank.

7. There is insufficient evidence to establish that Defendant was in any manner negligent with respect to the M/V CAPE SAN JUAN.

8. The cause in fact of the sinking of the M/V CAPE SAN JUAN was the existence of two small holes in the vessel's hull near the keel.

9. The cause in fact of the two holes was electrolysis.

10. There was insufficient evidence to establish that Defendant's conduct was a cause in fact or a proximate cause of the electrolysis which caused the two holes in the hull of the M/V CAPE SAN JUAN.

11. On May 8, 1977, Plaintiff entered into a contract for the salvage of the M/V CAPE SAN JUAN with Golden Triangle Towing and Fueling Company. Golden Triangle rendered salvage services pursuant to that contract, the

fair and reasonable value of those services in Orange, Texas, in May-June 1977 being NINETEEN THOUSAND TWO HUNDRED EIGHTY-THREE DOLLARS ($19,283.00). Golden Triangle was not paid by Plaintiff for those services.

12. Golden Triangle assigned its claim for those salvage services to Defendant. Defendant is entitled to recover the fair and reasonable value of those services from Plaintiff.

13. Defendant rendered repair services to the M/V CAPE SAN JUAN following salvage of the vessel. The fair and reasonable value of those repair services in Orange, Texas, in May-July 1977 was FIVE THOUSAND DOLLARS ($5,000.00).

14. Defendant was not paid by Plaintiff for those repair services and is entitled to recover the fair and reasonable value of those services from Plaintiff.

15. Defendant removed a bow fender system from the M/V CAPE SAN JUAN. The only competent evidence as to the value of the bow fender system was Defendant's admission that its fair and reasonable value in Orange, Texas, in 1977 was TWO THOUSAND DOLLARS ($2,000.00). Plaintiff is entitled to offset the value of the bow fender system from those sums it has been determined to owe to Defendant.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter under 28 U.S.C. §1333.

2. Plaintiff and Defendant must each prove their respective claim by a preponderance of the evidence, whether direct or circumstantial. *Skidmore v. Gruenenger,* 506 F.2d 716 (5th Cir. 1975); *Movible Offshore, Inc. v. M/V WILKEN A. FALGOUT,* 471 F.2d 268 (5th Cir. 1973).

3. As a matter of law, Plaintiff failed to prove by a preponderance of the evidence that Defendant was, at any time material hereto, a bailee of the M/V CAPE SAN JUAN.

4. As a matter of law, Plaintiff failed to prove by a preponderance of the evidence that Defendant was in any manner negligent in respect to the M/V CAPE SAN JUAN.

5. As a matter of law, Plaintiff failed to prove by a preponderance of the evidence that Defendant was in any manner responsible for the sinking of the M/V CAPE SAN JUAN.

6. Plaintiff is entitled to take nothing of and from Defendant by reason of its claims against Defendant. Such claims must be dismissed.

7. Defendant is entitled to take the sum of TWENTY-TWO THOUSAND TWO HUNDRED EIGHTY-THREE AND 00/100 DOLLARS ($22,283.00) of and from Plaintiff by reason of its counterclaim, such sum to bear interest at the rate of nine percent (9%) per annum from June 30, 1977 until paid.

8. All costs of Court are adjudged against Plaintiff.

9. Any Finding of Fact more properly a Conclusion

of Law is hereby deemed so; any Conclusion of Law more properly a Finding of Fact is hereby deemed so.

SIGNED and ENTERED April 22, 1982.

ROBERT M. PARKER
UNITED STATES DISTRICT JUDGE

APPENDIX "E"

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

T.N.T. MARINE SERVICE, INC.

VS. C. A. No:_____

WEAVER SHIPYARDS & DRY DOCKS, INC. *in personam* and against the Tug OCEAN WIND, her engines, tackle, apparel, etc. *in rem*

JURY TRIAL REQUESTED

ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

The Complaint of T.N.T. Marine Service, Inc. (hereinafter referred to as T.N.T.) against Weaver Shipyards & Dry Docks, Inc. (hereinafter Weaver Shipyards) for breach of contract, civil and maritime, and for maritime tort avers on information and belief as follows:

I.

This is a suit of a civil nature as law between a citizen of a state and citizens or subjects of a foreign state wherein the amount in controversy exceeds the sum of value of TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS, exclusive of interests and costs. Jurisdiction of the Court is invoked under 28 U.S.C. 1332.

II.

This is also a suit for breach of a maritime contract and for maritime tort.

III.

At all material times, T.N.T. was and now is a Florida corporation engaged in the business of towage and salvage and was and still is the owner of the steel tug M/V CAPE SAN JUAN, which vessel was at all material times tight, staunch, strong and in all respects seaworthy.

IV.

At all times, Weaver Shipyards was and still is a corporation organized and existing pursuant to the laws of the State of Texas with its principal place of business in Orange, Texas. Defendant's agent for service of process is Mike Caroll who may be served with service of process at 1905 Link, Orange, Texas.

FIRST CAUSE OF ACTION

V.

On or about April 28, 1977, the M/V CAPE SAN JAUN, while awaiting repairs and drydocking, sank at dockside in some 30 feet of water at Weaver Shipyard & Drydock, Inc. in Orange, Texas. The sinking was caused by the negligence of the shipyard in its care of the said vessel. In addition, Weaver Shipyards breached its contract with T.N.T. Marine Service, Inc., by failing to properly watch and care for the M/V CAPE SAN JUAN while the tug was in the possession, custody and control of the Defendant.

VI.

As a result of said sinking, the M/V CAPE SAN JUAN was damaged necessitating repairs estimated to cost approximately ONE HUNDRED EIGHTY THOUSAND ($180,000.00) DOLLARS. In addition, Plaintiff has lost the use of said vessel, the estimated value of which is THREE HUNDRED ($300.00) DOLLARS per day.

SECOND CAUSE OF ACTION

VII.

After the sinking of the M/V CAPE SAN JUAN, certain equipment was removed and tortiously converted by Defendant for its use and for use on board the Tug OCEAN WIND.

VIII.

The estimated value of the aforementioned equipment is THIRTY THOUSAND ($30,000.00) DOLLARS, for which the Plaintiff has a maritime lien against the Tug OCEAN WIND.

IX.

Plaintiff is further entitled to reasonable attorneys fees, interest and costs.

X.

Plaintiff requests trial by jury in the case.

WHEREFORE, PREMISES CONSIDERED,

T.N.T. Marine Service, Inc. prays:

1. That process in due form of law issue against Weaver Shipyards citing them to appear and answer the matters aforesaid;

2. That process according to the practice of this Honorable Court in causes of Admiralty and Maritime Jurisdiction in due form of law be issued against the Tug OCEAN WIND, its engines, tackle, apparel and equipment and that said vessel be attached, seized and sold to pay Plaintiff's claims herein.

3. That there be a judgment in favor of Plaintiff, T.N.T. Marine Service, Inc., against the Defendant, Weaver Shipyards & Dry Docks, Inc., and against the Tug OCEAN WIND, in the amounts aforesaid plus interest, costs and reasonable attorneys' fees incurred in bringing this action; and

4. That Plaintiff have such other and further relief as justice may require.

Respectfully submitted,

By: _____
Michael K. Clann
Attorney for Plaintiff,
T.N.T. Marine Service, Inc.
4150 Westheimer, Suite 333
Houston, Texas 77027
(713) 871-0333

OF COUNSEL

CLANN & PEARSON
4150 Westheimer, Suite 333
Houston, Texas 77027
(713) 871-0333

APPENDIX "F"

U.S. MARSHALS SERVICE
PROCESS RECEIPT and RETURN

INSTRUCTIONS: See "INSTRUCTIONS FOR SERVICE OF PROCESS BY THE U.S. MARSHAL" on the reverse of the last (No. 5) copy of this form please type or print legibly, insuring readability of all copies. Do not detach any copies

PLAINTIFF — Court Case Number
T.N.T. MARINE SRVICE, INC.

DEFENDANT
WEAVER SHIPYARDS & DRY DOCKS, INC. *in personam* and against the Tug OCEAN WIND, her engines, tackle, apparel, etc. *in rem*

TYPE OF PROCESS
ORIGINAL COMPLAINT

SERVE NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN
► Weaver Shipyards & Dry Docks, Inc. through Mike Carrol
AT ADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)
1905 Link
Orange, Texas

SEND NOTICE OF SERVICE COPY TO REQUESTER AT NAME AND ADDRESS BELOW:

Michael K. Clann
Clann & Pearson
4150 Westheimer, Suite 333
Houston, Texas 77027

Number of process to be served with this Form-285 — one (1)

Number of parties to be served in this case — one (1)

Check for service on U.S.A. — n/a

SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE (Include Business and Alternate Addresses, All Telephone Numbers, and Estimated Times Available For Service):

WITHHOLD *in rem* SEIZURE

Signature of Attorney or other Originator requesting service on behalf of: ☐ PLAINTIFF
/S/Illegible ☐ DEFENDANT

TELEPHONE NUMBER — DATE
713/871-0333 — 2/12/80

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY—DO NOT WRITE BELOW THIS LINE

I acknowledge receipt for the total number of process indicated (Sign only first USM 285 if more than one USM 285 is submitted) — Total Process

District of Origin — District to Serve
No. — No.

Signature of Authorized USMS Deputy or Clerk — Date

I hereby certify and return that I ☐ have personally served, ☐ have legal evidence of service, ☐ have executed as shown in "Remarks", the process described on the

individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., shown at the address inserted below.

☐ I hereby certify and return that I am unable to locate the individual, company, corporation, etc., named above. (See remarks below)

Name and Title of individual served (if not shown above)

☐ A person of suitable age and discretion then residing in the defendant's usual place of abode.

Address (complete only if different than shown above)

Date of Service Time am pm

Signature of U.S. Marshal or Deputy

Service Fee Total Mileage Charges (including endeavors)

Forwarding Fee Total Charges Advance Deposits

Amount owed to U.S. Marshal or Amount of Refund

REMARKS

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1. CLERK OF THE COURT

NO. 83-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

T.N.T. MARINE SERVICE, INC.,
Petitioner

v.

WEAVER SHIPYARDS AND DRYDOCKS, INC.,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

R. SCOTT HOGARTY
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Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTION PRESENTED

Whether or not, under the facts and circumstances of the case, the district court properly denied plaintiff a trial by jury where jurisdiction was invoked by plaintiff on the alternative bases of diversity of citizenship (28 U.S.C. § 1332) and admiralty (28 U.S.C. § 1333).

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT AND COURT OF APPEALS

Petitioner, T.N.T. Marine Service, Inc.

Respondent, Weaver Shipyards and Drydocks, Inc.

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NO. 83-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

T.N.T. MARINE SERVICE, INC.,
Petitioner

v.

WEAVER SHIPYARDS AND DRYDOCKS, INC.,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

To The Honorable Chief Justice And The Associate Justices Of The Supreme Court:

Respondent, Weaver Shipyards and Drydocks, Inc. (hereinafter referred to as "Weaver"), respectfully submits this its Brief in Opposition to Petitioner's Petition for Writ of Certiorari and respectfully prays that the Court deny issuance of the writ.

JURISDICTION

Respondent acknowledges that the Court has discretionary jurisdiction to grant the writ under 28 U.S.C. § 1254(i), but Respondent submits that there are no "special and important reasons," as required by Rule 17.1 of the Rules of the Supreme Court of the United States, for issuance of a writ in this case.

STATUTES AND RULES INVOLVED

1. 28 U.S.C. § 1332 (1956)—Diversity of citizenship; amount in controversy; costs.

(a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interests and costs and is between—

(1) citizens of different States;

2. 28 U.S.C. § 1333 (1949)—Admiralty, maritime and prize cases.

The District Courts shall have original jurisdiction, exclusive of the Courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction saving to suitors in all cases all other remedies to which they are otherwise entitled.

3. Fed. R. Civ. P. 9(h) — Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the District Court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cog-

nizable only in admiralty it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. (As amended Feb. 28, 1966, eff. July 1, 1966).

STATEMENT OF THE CASE

In late December, 1976, the M/V CAPE SAN JUAN was brought by Petitioner, her owner, to Respondent's facility in Orange, Texas. Petitioner initially alleged that the vessel was brought to Respondent's facility so that Respondent could perform various requested repairs to said vessel. Respondent has consistently denied Petitioner's allegations that Petitioner had requested Respondent to repair the vessel and that Respondent had agreed to repair the vessel. Rather, Respondent has consistently maintained that Petitioner's president requested that he be allowed to moor the CAPE SAN JUAN at Respondent's facility so that he and his crew could perform the necessary repairs and maintenance themselves. Because of the personal friendship of Petitioner's president and the president of Respondent's parent corporation, Respondent gave permission to Petitioner's president to moor the vessel at the facility. Such permission was given gratuitously. In addition, Respondent has consistently maintained that no bailment relationship existed between Respondent and Petitioner in respect to the CAPE SAN JUAN. In fact, Petitioner maintained a crew member on board the vessel for most of the time the vessel was moored at Respondent's facility. When Petitioner's president was attending and working on the vessel, he slept on board the vessel.

In the early morning hours of April 28, 1977, the CAPE SAN JUAN sank while unattended. The crew

member who had been on board had recently been sent home to a foreign country. Petitioner's president, who had been in attendance at the vessel and who had on such occasions slept on board the vessel, had instead spent the night of April 27/28, 1979 at a motel in Beaumont, Texas, approximately thirty miles from the site of Respondent's facility. There were no eyewitnesses to the sinking.

As is evident from Petitioner's Complaint, Petitioner alleged causes of action based on breach of contract, both civil and maritime, and based on tort. In addition, Petitioner brought an *in rem* admiralty action against a vessel owned by Respondent. Petitioner invoked diversity jurisdiction pursuant to 28 U.S.C. § 1332. Petitioner further alleged "this is also a suit for breach of a maritime contract and for maritime tort." (See Appendix I —Complaint of Plaintiff T.N.T. Marine Service, Inc., Paragraph II.) This was an express, alternative invocation of admiralty jurisdiction, pursuant to 28 U.S.C. § 1333. Petitioner, both in its Brief to the United States Court of Appeals for the Fifth Circuit and in its Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, has admitted that its Complaint invoked both diversity jurisdiction and admiralty jurisdiction.

Prior to trial, Respondent moved to strike Petitioner's jury request. The district court granted such request in view of the alternative jurisdictional bases under which Petitioner brought its causes of action. At no time prior to or at trial did Petitioner ever amend or seek to amend its pleadings so as to drop its allegation of admiralty jurisdiction. At no time did Petitioner evidence any desire to waive or dismiss its *in rem* cause of action.

At trial, at the close of Petitioner's case-in-chief and after Petitioner rested, the district court announced its rulings, which were subsequently formalized in the court's Judgment and in its Findings of Fact and Conclusions of Law, and dismissed Petitioner's claims. Those conclusions will be discussed more extensively in Section III, *infra,* but simply stated the district court held as a matter of law that Petitioner failed to establish liability on the part of Respondent. In direct contradiction to the assertion of Petitioner in its Petition for Writ of Certiorari (at p. 5), the CAPE SAN JUAN did not sink because of negligence on the part of Respondent.

Petitioner appealed the decision to the United States Court of Appeals for the Fifth Circuit on two points: that the district court erred in denying Petitioner a jury trial and that the district court's finding and conclusion that no bailment existed was clearly erroneous. The court of appeals affirmed the decision of the district court.

The sole issue being presented by Petitioner to this Court is whether the district court improperly denied it a trial by jury.

SUMMARY OF ARGUMENT

Petitioner pursued its claim in admiralty by bringing an *in rem* action against the Tug OCEAN WIND and by proper invocation of admiralty jurisdiction under Federal Rule of Civil Procedure 9(h). There is no conflict among the courts of appeal as the courts of the various circuits agree that invocation of admiralty jurisdiction under Federal Rule of Civil Procedure 9(h) carries with it the traditional admiralty procedure of a trial to the court. In any event, even if Petitioner was wrongfully denied a

trial by jury, such denial is legally irrelevant as the district court's decision dismissing the Petitioner's causes of action was made as a matter of law. The Petition for Writ of Certiorari should be denied because the decisions of the United States District Court for the Eastern District of Texas and the United States Court of Appeals for the Fifth Circuit are correct. The Petition for Writ of Certiorari should also be denied because there are no "special and important reasons" as required by Rule 17.1 of the Rules of the Supreme Court of the United States for the issuance of a writ in this case as there is no conflict among the United States Courts of Appeal on the issue in this case. Finally, the Petition for Writ of Certiorari should also be denied because the rulings of the district court in respect to the merits of Petitioner's case, which are rulings not challenged by Petitioner, were made as matters of law and not merely as matters of fact.

ARGUMENT

I.

Petitioner Pursued its Claim in Admiralty by Bringing an *In Rem* Action Against the Tug OCEAN WIND and by Proper Invocation of Admiralty Jurisdiction Under Federal Rule of Civil Procedure 9(h).

Petitioner, T.N.T. Marine Service, Inc., filed its Original Complaint as an action *in personam* against defendant, Weaver Shipyards and Dry Docks, Inc., and as an action *in rem* against the Tug OCEAN WIND. The complaint averred that the action was of a civil nature, invoking the district court's diversity jurisdiction under 28 U.S.C. § 1332, and also averred that the action was "for breach of a maritime contract and for maritime tort." Proper

invocation of the district court's admiralty and maritime jurisdiction under 28 U.S.C. § 1333 was admitted by Petitioner in its Brief to the United States Court of Appeals for the Fifth Circuit, and is not denied in its petition to this Court. At no time did Petitioner elect to amend its Original Complaint to eliminate either its *in rem* action against the Tug OCEAN WIND, or its invocation of admiralty and maritime jurisdiction.

Federal Rule of Civil Procedure 9(h) provides in pertinent part as follows:

> Rule 9. Pleading Special Matters.
>
> * * *
>
> (h) Admiralty and maritime claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes, whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15.

Identification of a claim as one within the purview of Rule 9(h) does not require specific mention of the rule itself; a statement identifying a claim as an admiralty or maritime claim is sufficient. This liberal approach is in accordance with the general intention of simplification in pleading found in Federal Rule of Civil Procedure 8(e)(1).

Rule 8. General Rules of Pleading.

* * *

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

The identifying statement of Rule 9(h) arose from the need to retain certain traditional admiralty procedures upon unification of the civil and admiralty rules in 1966. As stated in the Advisory Committee Notes to Rule 9(h):

> After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader's intentions regarding the procedures involved. The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed as at present under the savings to suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not to be required to forego mention of all available jurisdictional grounds.
>
> Other methods of solving the problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

Petitioner had the option of bringing its *in personam* claim as a civil action entirely within the diversity juris-

diction of the district court pursuant to the savings to suitors clause of 28 U.S.C. § 1333(1). *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962). In *Ellerman,* the plaintiff brought an admiralty action for breach of maritime contract on the law side of the court, basing jurisdiction entirely on diversity under 28 U.S.C. § 1332. The Court summarized the plaintiff's right to do so as follows:

> Congress since 1789, in giving Federal District Courts original jurisdiction of civil cases in admiralty, has saved "to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1). . . . Therefore, a suit for breach of a maritime contract, while it may be brought in admiralty, may also be pursued in an ordinary civil action, since, unlike the proceeding in *The Moses Taylor,* 4 Wall. 411, 18 L.Ed. 397, it is a suit *in personam.* "Where the suit is *in personam,* it may be brought either in admiralty or, under the saving clause, in an appropriate non-maritime court, by ordinary civil action." Gilmore and Black, The Law of Admiralty (1957), p. 36.

Id. at 359-60, 82 S.Ct. at 783-84, 7 L.Ed.2d at 804 (footnotes omitted). The Court pointed out that when an admiralty action is brought at law under diversity jurisdiction, a right to trial by jury accrues. Petitioner in the instant case, however, chose to identify its claim not only as a civil claim under diversity jurisdiction, but also as an admiralty claim pursuant to Rule 9(h). By opting to identify its claim as an admiralty claim, Petitioner elected to be governed by the procedural consequences flowing from Rule 9(h); in particular, Petitioner elected to be governed by Federal Rule of Civil Procedure 38(e), which provides:

Rule 38. Jury Trial of Right.

* * *

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 9(h) is not a harsh rule because a plaintiff, as noted in the Advisory Committee Notes to Rule 9(h), may elect to amend its pleading and remove the statement identifying the claim as an admiralty or maritime claim, in accordance with the liberal amendment rules of Federal Rule of Civil Procedure 15. A plaintiff may thereby rightfully make a claim for a jury trial. Petitioner did not elect to so amend its pleading, even subsequent to the denial of its request for jury trial, and so must be assumed to have intended to retain its admiralty election and the concomitant procedural consequences.

Petitioner also sued the Tug OCEAN WIND *in rem*. An *in rem* action is traditionally maritime in nature and has no equivalent common law counterpart. *The MOSES TAYLOR v. Hammons,* 4 Wall. 411, 18 L.Ed. 397 (1867). Therefore, petitioner's choice of an *in rem* proceeding would have mandated a traditional non-jury trial, traditional admiralty actions and their procedural consequences being retained by Rule 9(h) in the unification of civil and admiralty rules. As stated in the Advisory Committee Notes to Rule 9(h):

> It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute.

Petitioner did not choose to sever or eliminate through amendment its *in rem* claim, indicating clearly that its

intention was to retain the advantages of admiralty procedure in both an *in rem* action and under Rule 9(h). Petitioner must also be constrained to the procedural consequence of a non-jury trial.

Petitioner claims in its Petition to this Court that it did not take advantage of any admiralty procedures in its initial action in district court. However, Petitioner clearly took advantage of its ability to threaten seizure of the Tug OCEAN WIND pursuant to its *in rem* claim. While it is true that Petitioner withheld actual seizure of the vessel, it did not forego entirely its right to seize, as Supplemental Rule E of the Supplemental Rules for Certain Admiralty and Maritime Claims in the Federal Rules of Civil Procedure provides that a claimant may hold in abeyance seizure of a vessel by so requesting. Petitioner held out the threat of seizure until assured that the claimant of the vessel would appear, answer and defend. Actual seizure of a vessel is not necessary to maintain an *in rem* action. *Jones v. The RICHMOND*, 13 Fed. Cas., No. 7,492 (S.D.N.Y. 1858). As stated in *Jones*, "the personal appearance of the defendants, by stipulation and answer, is equivalent to an attachment of the property itself." *Id.* Respondent filed its Claim to A Vessel, answering and agreeing to defend against the *in rem* claim. Respondent's claim to the Tug OCEAN WIND rendered unnecessary actual seizure of the vessel prior to trial of the action. Petitioner cannot claim not to have taken advantage of admiralty procedures when it obtained defendant's answer and claim to the Tug OCEAN WIND by the implicit threat of seizure.

Clearly, Petitioner availed itself of the admiralty procedures flowing from an *in rem* claim, and properly invoked admiralty jurisdiction under Rule 9(h). Therefore,

Petitioner must be required to follow all of the procedural consequences of its jurisdictional choice, and must not be allowed to pick and choose the procedural advantages of civil and admiralty jurisdiction and thereby render meaningless the proper invocation of federal admiralty jurisdiction.

Apart from the foregoing, what Petitioner chose or chose not to do is legally irrelevant. Petitioner made available remedies and procedures peculiar to admiralty by pleading as it did. Whether it chose to actually employ those remedies and procedures is of no consequence to the issues under consideration here.

II.

There is no Conflict Among the Courts of Appeal as the Courts of the Various Circuits Agree That Proper Invocation of Admiralty Jurisdiction Under Federal Rule of Civil Procedure 9(h) Carries with it the Traditional Admiralty Procedure of a Trial to the Court.

The courts of the various circuits are in agreement that proper invocation of admiralty jurisdiction under Rule 9(h) carries with it the procedural consequence of a non-jury trial. In *Americana Co. of Puerto Rico, Inc. v. Transocean Tankers Corp.*, 317 F. Supp. 798 (D. Puerto Rico 1969), the district court stated that a complaint alleging jurisdictional grounds of admiralty and diversity, without specific mention of Rule 9(h), left "no doubt that plaintiff, through the allegations of its complaint, has clearly chosen to assert and identify its claim for relief as an admiralty or maritime claim within the meaning of Rule 9(h), Federal Rules of Civil Pro-

cedure." *Id.* Consequently, that court held that, pursuant to Federal Rule of Civil Procedure 38(e), plaintiff was not entitled to a jury trial, and defendant's motion to strike plaintiff's demand for a jury trial was granted. The decision in *Transocean Tankers* mandates a similar result in the instant case.

In *Alaska Barite Co. v. Freighters, Inc.*, 54 F.R.D. 192 (N.D. Cal. 1972), the district court, citing *Transocean Tankers, supra,* stated in denying a defendant's demand for a jury trial on its counterclaim at law to plaintiff's properly invoked Rule 9(h) admiralty claim, "[t]he purpose of Rule 9(h) is to allow the moving party, who could either bring suit under admiralty or civil law, to clearly elect which form of proceeding he chooses." *Id.* at 194. The result, the court went on to state, is that "Rule 9(h) when properly elected prevents either party having a jury trial." *Id.*

In *Williams v. Shipping Corp. of India, Ltd.*, 354 F. Supp. 626 (S.D. Ga. 1973), the district court, also citing *Transocean Tankers, supra,* stated that "[w]here a plaintiff in a maritime tort case bases jurisdiction both on admiralty and on diversity grounds, but identifies the claim as one in admiralty, in accordance with Rule 9(h), his demand for a jury trial will be stricken." *Id.* at 629. The court went on to point out that the election to proceed under admiralty procedures is not an irrevocable election. Where an equivalent action at law based on diversity jurisdiction is available and is properly pled, and the statement identifying the claim as an admiralty or maritime claim is withdrawn, plaintiff may proceed with a proper request for jury trial. In *Williams,* the plaintiff merely added diversity jurisdiction and did not withdraw its admiralty claim. The court found that reli-

ance on both admiralty and diversity jurisdiction constrained plaintiff to traditional admiralty procedures and struck plaintiff's request for a jury trial. *See also Gilmore v. Witschorek,* 411 F. Supp. 491 (E.D. Ill. 1976).

The United States Court of Appeals for the Fifth Circuit is in direct accord with the preceding line of cases. In *Romero v. Bethlehem Steel Corp.,* 515 F.2d 1249 (5th Cir. 1975), the court of appeals stated:

> The unification of the admiralty and civil rules in 1966 was intended to work no change in the general rule that admiralty claims are to be tried without a jury. . . . Fed. R. Civ. P. 9(h) serves only as a device by which the pleader may claim the special benefits of admiralty procedures and remedies, including a non-jury trial, when the pleadings show that both admiralty and some other basis of federal jurisdiction exist.

Id. at 1252. The court discussed the common understanding that an admiralty action cognizable on the law side may be brought in federal court on diversity jurisdiction pursuant to the savings to suitors clause, and concluded that, had the plaintiff desired, he "could have obtained a jury trial on all claims simply by omitting or withdrawing the 9(h) designation in his complaint and bringing his *entire* suit as a civil action." *Id.* at 1254 (emphasis added). *See also, Powell v. Offshore Navigation, Inc.,* 644 F.2d 1063, 1066, *reh. den.,* 648 F.2d 1351 (5th Cir. 1981). It is perfectly clear from Rule 9(h) and *Transocean Tankers, supra,* that a 9(h) designation may be accomplished by a simple statement identifying a claim as an admiralty or maritime claim, and need not be made by the incantatory recitation of "Federal Rule of Civil Procedure 9(h)." Removal of a statement identifying a

claim as an admiralty or maritime claim accomplishes removal of a 9(h) designation.

In a conclusion apropos to the instant case, the court in *Romero, supra,* stated:

> [Romero] persistently refused to seek an amendment aimed at withdrawing the admiralty identification. We can find no logical purpose for this refusal in the face of his repeatedly professed desire for a jury.

Id. at 1254. Petitioner claims to have followed the *Romero* instructions in order to obtain a jury trial, yet Petitioner persistently refused to withdraw its admiralty identification. Had it indeed followed *Romero,* it would have brought its *entire* claim as a civil action under diversity jurisdiction. The only conclusion to be reached from Petitioner's failure to amend is that it desired to retain the procedural advantages of an admiralty action. Therefore, consistent with such procedure, Petitioner must be constrained to a non-jury trial.

Petitioner attempts to confuse the issue presented to this Honorable Court by claiming that *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 83 S.Ct. 1623, 10 L.Ed.2d 720 (1963), and its progeny, govern. *Fitzgerald* was a narrow decision, however, sanctioning only "a consolidated jury trial for an admiralty claim for maintenance and cure and a Jones Act claim for damages, both arising from the same injury and asserted by the same plaintiff against the same defendant." *Blake v. Farrell Lines, Inc.,* 417 F.2d 264 (3d Cir. 1969).

A jury trial is part and parcel of the remedy in a claim pursued under the Jones Act, 46 U.S.C. § 688. *See Schulz v. Pennsylvania Railroad Co.,* 350 U.S. 523, 76 S.Ct.

608, 100 L.Ed. 668 (1956). The Court in *Fitzgerald, supra,* stated that "since Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury, we would not be free, even if we wished, to require submission of all the claims to the judge alone." 374 U.S. at 21, 83 S.Ct. at 1650, 10 L.Ed.2d at 725. Rather than sever the claims, in the interest of judicial economy the Court in *Fitzgerald* found it reasonable to try the Jones Act claim and the maintenance and cure and unseaworthiness claims, considered "essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments," to a single trier of fact. *Id.* The logical choice for the trier of fact was the jury, mandated as part of the remedy included within the Jones Act.

In the instant case, in contrast to a Jones Act case, a jury trial is not part and parcel of a Congressionally mandated remedy. Rather, a jury trial is a procedural choice which may be made in a traditional *in personam* admiralty claim by bringing the action on the law side of the court pursuant to the savings to suitors clause of 28 U.S.C. § 1333. Where, as in this case, the decision is made by the plaintiff to pursue its claim in admiralty, the procedural choice concomitant with that decision is a non-jury trial. Petitioner should not be free to remand that decision by circumventing the procedures provided for proper invocation of a jury trial, thereby undermining traditional admiralty jurisdiction and procedure.

The courts of appeal of the various circuits are in agreement with *Fitzgerald, supra,* in allowing a jury trial in the limited instance of admiralty claims joined with a Jones Act claim. *See e.g., Simko v. C&C Marine Maintenance Co.,* 594 F.2d 960 (3d Cir.), *cert. den.,* 444 U.S. 833, 100 S.Ct. 64, 62 L.Ed.2d 42 (1979); *Peace v.*

Fidalgo Island Packing Co., 419 F.2d 371 (9th Cir. 1969); *Haskins v. Point Towing Co.*, 395 F.2d 737, *aff'd after remand*, 421 F.2d 532 (3d Cir.), *cert. den.*, 400 U.S. 834, 91 S.Ct. 68, 27 L.Ed.2d 66 (1970). It is clear that, as stated in *Alaska Barite, supra*, "[w]ith the exception of maritime claims where jury trials are statutorily created such as under the Jones Act, 46 U.S.C. 688, Fitzgerald v. United States Lines, 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed. 2d 720 (1963), the courts have held that Rule 9(h) was meant to preserve the admiralty non-jury practice." 54 F.R.D. at 194. Petitioner in the instant case, having properly pursued a Rule 9(h) claim, is therefore constrained to a non-jury trial.

III.

Even If Petitioner was Wrongfully Denied a Trial by Jury, Such Denial is Legally Irrelevant as the District Court's Decision Dismissing the Petitioner's Causes of Action Was Made as a Matter of Law.

At the conclusion of the presentation of the Petitioner's case, after Petitioner rested, and before Respondent could move for involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b), the district court announced its decision from the bench. Its oral decision was later formalized as the court's Findings of Fact and Conclusions of Law and as its Judgment. The court held, both as a matter of fact and as a matter of law, that there was insufficient evidence to establish that Respondent was in any manner negligent with respect to the M/V CAPE SAN JUAN. (Appendix II—Findings of Fact and Conclusions of Law—Finding No. 7 and Conclusion No. 4.) The court also held, again both as a matter of fact and as a matter of law, that there was insufficient evidence

to establish that a bailment relationship existed between Petitioner and Respondent such that Respondent would have been a bailee of the CAPE SAN JUAN at the time the vessel was in Respondent's shipyard or at the time the vessel sank. (Appendix II—Findings of Fact and Conclusions of Law—Finding No. 6 and Conclusion No. 3.) Finally, the district court held, as a matter of law, that Petitioner had failed to prove by a preponderance of the evidence that Respondent was in any manner responsible for the sinking of the CAPE SAN JUAN. (Appendix II—Findings of Fact and Conclusions of Law —Conclusion No. 5.)

Petitioner appealed the district court's holding regarding the bailment issue to the court of appeals which affirmed on that and on the other point of appeal. Petitioner does not now contest the sufficiency or correctness of any of the district court's findings of fact or conclusions of law.

Although Federal Rule of Civil Procedure 41(b) regarding involuntary dismissals is by its terms applicable to actions tried to the court and Federal Rule of Civil Procedure 50(a) regarding directed verdicts is by its terms applicable to actions tried to a jury, the district court's action in dismissing Petitioner's causes of action at the close of Petitioner's case-in-chief is more closely analogous to the granting of a directed verdict than it is to the granting of an involuntary dismissal. While the court may make factual determinations in the course of deciding upon a Rule 41(b) motion, the court must consider the evidence in the light most favorable to the party moved against in determining whether a motion for directed verdict should be granted because of the legal insufficiency of the evidence produced by the party moved against. *See generally* 5 Moore's Fed. Prac. ¶ 41.13 [3]; 5A Moore's Fed. Prac. ¶ 50.03[1]. It is clear that

the standards, while very similar, do vary and that the requisite standard for a directed verdict is, if anything, stricter than that for an involuntary dismissal as any issue of credibility must be resolved in favor of the party moved against. *See, e.g., Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668 (9th Cir. 1975).

As is evident from the district court's Findings of Fact and Conclusions of Law, all determinations were made, as matters of law as well as matters of fact, based upon the sufficiency of the evidence presented, not upon the credibility of such evidence. As this Court stated in *Brady v. Southern R.R.*, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943):

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims.

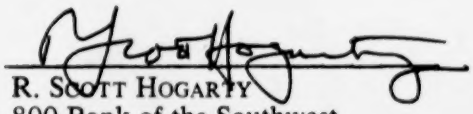
Id. at 479-480, 64 S.Ct. at 234, 88 L.Ed. at 243. Assessing the sufficiency of the evidence at the close of the Petitioner's case, the district court, finding the evidence to be insufficient, acted as it must and dismissed the Petitioner's causes of action. Whether Petitioner was entitled to a trial by jury or not is, therefore, legally irrelevant as its evidence was legally insufficient to prove its claims. The absence of a jury could not have adversely affected the outcome of the case from Petitioner's standpoint.

CONCLUSION

The courts of the various circuits are in agreement with regard to the intent of Rule 9(h). When properly invoked, it gives rise to a traditional admiralty non-jury trial in accordance with traditional admiralty procedures. The various courts of appeal are also in agreement with regard to the limited exception, inapplicable in the instant case, of allowing a jury trial on admiralty claims joined with a Jones Act claim. Case law makes clear that the procedure for procuring a jury trial in an *in personam* admiralty claim is to bring such claim on the law side of the court under diversity jurisdiction or other non-admiralty jurisdiction. Case law and Rule 9(h) itself make clear the procedure for procuring a non-jury trial in a traditional admiralty action. In any event, Petitioner could not have obtained any other result even if the case had been tried to a jury as the district court's Judgment and Findings of Fact and Conclusions of Law were in the nature of a directed verdict. There is no ambiguity in the Federal Rules of Civil Procedure or confusion among

the circuits which would justify granting a writ of certiorari in the instant case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have deposited three copies of the above and foregoing Brief for Respondent in the United States Mail, first class postage prepaid, and addressed to:

Timothy F. Burr
Peter L. Hilbert, Jr.
McGlinchey, Stafford, Mintz & Celleni
600 Camp Street
New Orleans, Louisiana 70130

on this 1st day of September, 1983.

R. Scott Hogarty

R. SCOTT HOGARTY

APPENDIX I

IN THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

T.N.T. MARINE SERVICE, INC.

VS. C. A. No.:_____

WEAVER SHIPYARDS & DRY DOCKS, INC. *in personam* and against the Tug OCEAN WIND, her engines tackle, apparel, etc. *in rem*

JURY TRIAL REQUESTED

ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

The Complaint of T.N.T. Marine Service, Inc. (hereinafter referred to as T.N.T.) against Weaver Shipyards & Dry Docks, Inc. (hereinafter Weaver Shipyards) for breach of contract, civil and maritime, and for maritime tort avers on information and belief as follows:

I.

This is a suit of a civil nature as law between a citizen of a state and citizens or subjects of a foreign state wherein the amount in controversy exceeds the sum of value of TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS, exclusive of interests and costs. Jurisdiction of the Court is invoked under 28 U.S.C. 1332.

II.

This is also a suit for breach of a maritime contract and for maritime tort.

III.

At all material times, T.N.T. was and now is a Florida corporation engaged in the business of towage and salvage and was and still is the owner of the steel tug M/V CAPE SAN JUAN, which vessel was at all material times tight, staunch, strong and in all respects seaworthy.

IV.

At all times, Weaver Shipyards was and still is a corporation organized and existing pursuant to the laws of the State of Texas with its principal place of business in Orange, Texas. Defendant's agent for service of process is Mike Caroll who may be served with service of process at 1905 Link, Orange, Texas.

FIRST CAUSE OF ACTION

V.

On or about April 28, 1977, the M/V CAPE SAN JUAN, while awaiting repairs and drydocking, sank at dockside in some 30 feet of water at Weaver Shipyard & Drydock, Inc. in Orange Texas. The sinking was caused by the negligence of the shipyard in its care of the said vessel. In addition, Weaver Shipyards breached its contract with T.N.T. Marine Service, Inc., by failing to properly watch and care for the M/V CAPE SAN JUAN while the tug was in the possession, custody and control of the Defendant.

VI.

As a result of said sinking, the M/V CAPE SAN JUAN was damaged necessitating repairs estimated to cost approximately ONE HUNDRED EIGHTY THOUSAND ($180,000.00) DOLLARS. In addition, Plaintiff has lost the use of said vessel, the estimated value of which is THREE HUNDRED ($300.00) DOLLARS per day.

SECOND CAUSE OF ACTION

VII.

After the sinking of the M/V CAPE SAN JUAN, certain equipment was removed and tortiously converted by Defendant for its use and for use on board the Tug OCEAN WIND.

VIII.

The estimated value of the aforementioned equipment is THIRTY THOUSAND ($30,000.00) DOLLARS, for which the Plaintiff has a maritime lien against the Tug OCEAN WIND.

IX.

Plaintiff is further entitled to reasonable attorneys fees, interest and cost.

X.

Plaintiff requests trial by jury in the case.

WHEREFORE, PREMISES CONSIDERED, T.N.T. Marine Service, Inc. prays:

1. That process in due form of law issue against Weaver Shipyards citing them to appear and answer the matters aforesaid;

2. That process according to the practice of this Honorable Court in causes of Admiralty and Maritime Jurisdiction in due form of law be issued against the Tug OCEAN WIND, its engines, tackle, apparel and equipment and that said vessel be attached, seized and sold to pay Plaintiff's claims herein.

3. That there be a judgment in favor of Plaintiff, T.N.T. Marine Service, Inc., against the Defendant, Weaver Shipyards & Dry Docks, Inc., and against the Tug OCEAN WIND, in the amounts aforesaid plus interest, costs and reasonable attorneys' fees incurred in bringing this action; and

4. That Plaintiff have such other and further relief as justice may require.

Respectfully submitted,

By: _____

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APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

T.N.T. MARINE SERVICE, INC.

V. CIVIL ACTION NO. B-80-122-CA

WEAVER SHIPYARD & DRYDOCK, INC., *in personam*, and the TUG OCEAN WIND, her engines, tackle, apparel, etc., *in rem*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Federal Rule of Civil Procedure 52, the Court hereby enters the following Findings of Fact and Conclusions of law:

FINDINGS OF FACT

1. This is a non-jury admiralty suit brought by T.N.T. Marine Service, Inc. against Weaver Shipyard and Drydock, Inc. and the TUG OCEAN WIND. It arises out of the sinking of the M/V CAPE SAN JUAN on or about April 28, 1977, while it was docked at Defendant's Shipyard, and out of the alleged removal of equipment from the M/V CAPE SAN JUAN, also while it was docked at Defendant's shipyard.

2. Defendant counterclaimed seeking recovery of costs incurred in the salvage and repair of the M/V CAPE SAN JUAN.

3. Plaintiff was at all material times the owner of the M/V CAPE SAN JUAN.

4. Defendant was at all material times the owner of a shipyard and ship repair facility on the Neches River in Orange, Texas.

5. The M/V CAPE SAN JUAN sank on or about April 28, 1977 at Defendant's shipyard in Orange, Texas.

6. There is insufficient evidence to establish that a bailment relationship existed between Plaintiff and Defendant such that Defendant would have been a bailee of the M/V CAPE SAN JUAN at the time the vessel was in Defendant's shipyard or at the time the vessel sank.

7. There is insufficient evidence to establish that Defendant was in any manner negligent with respect to the M/V CAPE SAN JUAN.

8. The cause in fact of the sinking of the M/V CAPE SAN JUAN was the existence of two small holes in the vessel's hull near the keel.

9. The cause in fact of the two holes was electrolysis.

10. There was insufficient evidence to establish that Defendant's conduct was a cause in fact or a proximate cause of the electrolysis which caused the two holes in the hull of the M/V CAPE SAN JUAN.

11. On May 8, 1977, Plaintiff entered into a contract for the salvage of the M/V CAPE SAN JUAN with Golden Triangle Towing and Fueling Company. Golden Triangle rendered salvage services pursuant to that contract, the fair and reasonable value of those services in Orange, Texas, in May-June 1977 being NINETEEN THOUSAND TWO HUNDRED EIGHTY-THREE DOL-

LARS ($19,283.00). Golden Triangle was not paid by Plaintiff for those services.

12. Golden Triangle assigned its claim for those salvage services to Defendant. Defendant is entitled to recover the fair and reasonable value of those services from Plaintiff.

13. Defendant rendered repair services to the M/V CAPE SAN JUAN following salvage of the vessel. The fair and reasonable value of those repair services in Orange, Texas, in May-July 1977 was FIVE THOUSAND DOLLARS ($5,000.00).

14. Defendant was not paid by Plaintiff for those repair services and is entitled to recover the fair and reasonable value of those services from Plaintiff.

15. Defendant removed a bow fender system from the M/V CAPE SAN JUAN. The only competent evidence as to the value of the bow fender system was Defendant's admission that its fair and reasonable value in Orange, Texas, in 1977 was TWO THOUSAND DOLLARS ($2,000.00). Plaintiff is entitled to offset the value of the bow fender system from those sums it has been determined to owe to Defendant.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter under 28 U.S.C. § 1333.

2. Plaintiff and Defendant must each prove their respective claim by a preponderance of the evidence, whether direct or circumstantial. *Skidmore v. Gruenenger*, 506 F.2d 716 (5th Cir. 1975); *Movible Offshore, Inc. v. M/V WILKEN A. FALGOUT*, 471 F.2d 268 (5th Cir. 1973).

3. As a matter of law, Plaintiff failed to prove by a preponderance of the evidence that Defendant was, at any time material hereto, a bailee of the M/V CAPE SAN JUAN.

4. As a matter of law, Plaintiff failed to prove by a preponderance of the evidence that Defendant was in any manner negligent in respect to the M/V CAPE SAN JUAN.

5. As a matter of law, Plaintiff failed to prove by a preponderance of the evidence that Defendant was in any manner responsible for the sinking of the M/V CAPE SAN JUAN.

6. Plaintiff is entitled to take nothing of and from Defendant by reason of its claims against Defendant. Such claims must be dismissed.

7. Defendant is entitled to take the sum of TWENTY-TWO THOUSAND TWO HUNDRED EIGHTY-THREE AND 00/100 DOLLARS ($22,283.00) of and from Plaintiff by reason of its counterclaim, such sum to bear interest at the rate of nine percent (9%) per annum from June 30, 1977 until paid.

8. All costs of Court are adjudged against Plaintiff.

9. Any Finding of Fact more properly a Conclusion of Law is hereby deemed so, any Conclusion of Law more properly a Finding of Fact is hereby deemed so.

SIGNED and ENTERED April 22, 1982.

ROBERT M. PARKER
United States District Judge